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In the Supreme Court

of the United States

OCTOBER TERM, 1975

No. 75-1626

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., OREGON-COLUMBIA CHAPTER, JOINT COUNCIL OF TEAMSTERS NO. 37, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, NORTHWEST CONCRETE PUMPING ASSOCIATION, INC., and HANS JUHR, KENNETH J. JUHR and DAN JUHR, dba JUHR & SONS, et al.,

Petitioners,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 701,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No.

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., OREGON-COLUMBIA CHAPTER, et al.,

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v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 701,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit of January 28, 1976.

OPINION BELOW

The opinion of the court of appeals is reported at 91 L.R.R.M. 2426. A copy is attached as Appendix A, infra A19.

The oral opinion of the district court on February 25, 1974 is unreported. A copy is attached as Appendix B, infra, A27.

JURISDICTION

The judgment of the court of appeals was entered January 28, 1976. Petitioners filed a timely petition for rehearing and suggestion for rehearing in banc, which was denied on April 13, 1976. A copy of the order denying the petition is attached as Appendix C, infra, A34. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a union that loses an NLRB jurisdictional award of subcontracted work under § 10(k) of the Labor Management Relations Act, 29 U.S.C. § 160(k), nevertheless can recover damages for breach of provisions in its labor contract with the general contractor requiring that the work be assigned to its members either by directly employing them or by engaging subcontractors that employ them.

STATUTES INVOLVED

The case involves the following provisions of the Labor Management Relations Act, 1947, as amended by Public Law 86-257, 1959:

1. Sec. 8(b)(4)(D), 29 U.S.C. § 158(b)(4)(D), 61 Stat. 140, 73 Stat. 542:

> Sec. 8 (b) It shall be an unfair labor practice for a labor organization or its agents— . . .
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: . . .
>
> (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: . . . .

2. Sec. 10(k), 29 U.S.C. § 160(k), 61 Stat. 146:

> Sec. 10 (k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted or agreed upon methods for the voluntary adjustment of

the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

STATEMENT OF THE CASE

1. The material facts.

This action arose out of a jurisdictional dispute between respondent Operating Engineers Local 701 ("701") and petitioner Joint Council of Teamsters No. 37 ("Teamsters") over concrete pumping work. Under accepted industry practice in Oregon and southwest Washington, most of such work is assigned to Teamsters, who are employed by small subcontractors that specialize in concrete pumping and are members of Northwest Concrete Pumping Association ("Northwest"). Northwest has a labor contract with Teamsters, but not with 701. A few subcontractors employ members of 701, but they cannot supply the industry's needs and perform only a small proportion of this work.

In support of its jurisdictional claim to concrete pumping work, 701 negotiated a labor agreement with petitioner Associated General Contractors ("AGC") containing a direct work-assignment clause covering such work and a subcontractor clause requiring subcontractors to be signatories to "this labor agreement." AGC has no contract with Teamsters covering concrete pumping work.

Thereafter, Western-Pacific Piledriving Corp. ("Western-Pacific"), a member of AGC, subcontracted concrete pumping at Trojan Nuclear Plant to Pump-Con, Inc., a member of Northwest, and Teamsters were thus assigned the work. Local 701 filed a contract grievance against Western-Pacific, claiming it had violated the AGC-701 contract, and a contract Board of Adjustment (which did not include Teamsters) held that the contract required assignment of the work to members of 701. When Western-Pacific proposed to reassign the work to members of 701, Teamsters threatened to strike. Western-Pacific thereupon filed a charge with the National Labor Relations Board ("the Board") under § 8(b)(4)(D), and the Board held a hearing under § 10(k) in which all interested parties participated, including 701, Teamsters, Western-Pacific, Northwest and AGC.

In its decision, 205 N.L.R.B. 383, the Board evaluated the relevant factors, including the two labor agreements, the area practice of subcontracting concrete pumping to members of Northwest who employ Teamsters, and considerations of experience, efficiency and economy, and awarded the disputed work to the Teamster employees of Pump-Con.

In addition, the Board determined that the dispute was a broad one and should be broadly resolved. It observed that 701's claim "rests on the language of the AGC-[701] collective bargaining agreement" and that the Trojan dispute was "thus merely an incident in the basic disagreement between the parties." It con-

cluded that the award should be "as extensive as the dispute" and therefore made it applicable to all "similarly disputed work performed by the present members of Northwest" throughout the common area of the two unions in Oregon and southwest Washington. A copy of the Board's decision is attached as Appendix D, infra A36.

Local 701 did not seek review of the Board's § 10 (k) decision.

2. Proceedings in the courts below.

Despite the Board's § 10(k) decision, 701 continued to file contract grievances against Western-Pacific and other AGC members who assigned concrete pumping to Teamsters by subcontracting to members of Northwest, and demanded arbitration of claims for damages for breach of the AGC-701 contract. AGC filed this action in the district court under § 301 of L.M.R.A., 29 U.S.C. § 185, to enjoin arbitration. The district court held that an arbitration award of damages based on 701's contract with AGC would be inconsistent with the Board's § 10(k) decision, and that arbitration should be enjoined (R. 341-342).[1]

The court of appeals reversed. In its decision it purported to recognize that the superior authority of the Board's § 10(k) decision bars inconsistent arbitra-

[1] To avoid similar future claims, the district court also reformed the AGC-701 contract to make it consistent with the Board's § 10(k) decision.

tion or court awards and "preempts the contract provision" for the work assignment.[2] On this ground, the court conceded that if a single employer were involved (rather than a contractor and subcontractor), the Board's § 10(k) decision would preclude enforcing against the employer a contract clause requiring assignment of the work to the losing union, and would also preclude a claim for damages for failure to so assign it.[3] See A24.

However, the court confined the superior authority of the Board's § 10(k) decision to jurisdictional disputes involving a single employer; because the disputed work had been subcontracted, it held that the union that lost in the § 10(k) proceeding could nevertheless recover damages from an AGC contractor who indirectly assigned the work to Teamsters by letting a subcontract for concrete pumping to a member of Northwest.

REASONS FOR ALLOWING THE WRIT

The court of appeals' decision is inconsistent with controlling principles applied in the decisions of this Court and of other courts of appeals. Its effect is to make the Board's orders under § 10(k) inef-

[2] The court of appeals states "To effectuate the purposes of § 10(k), it is essential that once an NLRB order becomes final, no court — state or federal — be permitted to impair compliance with it." See A23.

[3] The court states only that it is "arguable" that such damages are precluded, but it cites *Carey* v. *Westinghouse Electric Corp.*, (1964) 375 U.S. 261, which states that damages are not recoverable. 375 U.S. at 272.

fective to resolve jurisdictional disputes whenever disputed work is performed by subcontractors, which is a dominant practice throughout the construction industry. Whether a § 10(k) order awarding disputed work to employees of a subcontractor supersedes a subcontractor clause in the general contractor's agreement with the losing union is an important question of federal law that the court of appeals has decided and that has not been, but should be, settled by this Court.

1. The court's decision that the Board's § 10(k) order did not supersede inconsistent clauses in the AGC-701 agreement is contrary to the decisions of this Court and of other courts of appeals in failing to recognize the superior authority of the Board's jurisdictional decision over awards by arbitrators or courts based on alleged breaches of labor contracts.

In its § 10(k) decision, the Board relied on the area industry practice of subcontracting concrete pumping to members of Northwest and plainly contemplated that it would continue; indeed, this is the "similarly disputed work" that the Board included within its award. However, a general contractor who will be liable for damages for breach of the AGC-701 agreement obviously will not engage members of Northwest to perform concrete pumping, and work that would have been (and that the Board has held should be) performed by Teamsters will be performed instead by the union that lost in the § 10(k) proceeding. Thus, the court has rendered the Board's order ineffective by allowing damages for breach of a contract that the Board considered and rejected in the § 10(k) proceeding.

The court's decision is inconsistent with decisions of this Court, of other circuits, and of district courts which have held that Board orders take precedence over private arbitration claims under § 301:

In *CBS*[4] this Court held that § 10(k) places "entirely on the Board" responsibility to examine all factors and finally resolve "the underlying jurisdictional dispute" by specifically awarding the disputed work to one of the contending groups. In *Carey*,[5] the Court recognized that although private arbitration of jurisdictional claims is required by a broad arbitration provision in a labor contract, the "superior authority of the Board may be invoked at any time", and in the case of a § 10(k) ruling "Should the Board disagree with the arbiter . . . the Board's ruling would, of course, take precedence; and if the employer's action had been in accord with that ruling, it would not be liable for damages [for breach of contract] under § 301." In *New Orleans*[6] the Fifth Circuit refused to enforce an arbitrator's contract award of work to the union that lost

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[4] *N.L.R.B.* v. *Radio and Telev. Broadcast. Eng. Union*, (1961) 364 U.S. 573, 581, 582, 586.

[5] *Carey* v. *Westinghouse Electric Corp.*, (1964) 375 U.S. 261, 272. Justices Black and Clark dissented, on the ground that the case presented only a "plain, garden-variety jurisdictional dispute between two unions" which could not be resolved in an arbitration involving only one of them. All of the justices thus agreed to the "superior authority" of the Board's decision over any private arbitration award for damages. 375 U.S. at 274.

[6] *New Orleans Typographical Union No. 17* v. *N.L.R.B.*, (5th Cir. 1966) 368 F.2d 755.

in a § 10(k) proceeding. In *Union Tank*[7] and *Smith Steel*[8] the Seventh Circuit refused to enforce arbitration decisions for breach of contract which were inconsistent with Board orders. Reported district court decisions have held the same.[9]

In this case, the court of appeals sought to distinguish these decisions, on the ground they "all involve a single employer."[10] While cases decided by the courts since *Carey* have involved only one employer, no other court has drawn this distinction, and there is nothing in the *Carey* rule or in the nature of jurisdictional disputes that would require it. The Board and the courts have consistently treated disputes as jurisdictional, whether one employer is involved or more than one, and specifically in disputes involving construction subcontracts.[11]

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[7] *Local 7-210, Oil, Chemical and A. Wkrs.* v. *Union Tank Car Co.*, (7th Cir. 1973) 475 F.2d 194, cert. den. (1973) 414 U.S. 875.

[8] *Smith Steel Workers* v. *A. O. Smith Corp.*, (7th Cir. 1969) 420 Fed. 1.

[9] *Dock, Load. & Unload., Loc. U. No. 854* v. *W. L. Richeson & Sons, Inc.*, (E.D. La. 1968) 280 F. Supp. 402; *International Ass'n, Etc., Loc. 395* v. *Lake Cty. Ind. Coun.*, (N.D. Ind. 1972) 347 F. Supp. 1377.

[10] See A24.

[11] Board: E.g., *Electrical Wkrs. Union (Western Electric Co.)*, (1963) 141 N.L.R.B. 888, 52 L.R.R.M. 1419 (Held: Section 10(k) applies "to an attempt, as here, to force the indirect assignment of work from employees of one employer (Western) to employees of another (Fischbach or another electric contractor)", 141 N.L.R.B. at 894); *Plumbers & Pipefitters Union (Arthur Venneri Co.)*, (1964) 145 N.L.R.B. 1580, 55 L.R.R.M. 1196 (Held: "The Board has held consistently, and we adhere to the view, that section 8(b)(4)(D) applies to such attempts to force changes in subcontracting arrangements between employers", 145 N.L.R.B. at 1589); *Sheet Metal Workers Local 28 (Diesel Construction)* (1971) 194 N.L.R.B. 79, 78 L.R.R.M. 1634; *Carpenters, District Council (Master Builders Assn.)* (1975) 216 N.L.R.B. No. 182, 88 L.R.R.M. 1610; *Longshoremen (Calif. Cartage Co.)*, (1974) 208 N.L.R.B. 986, 85 L.R.R.M. 1289; *Longshoremen's Union (Marine Assn. of Chicago)*, (1965) 151 N.L.R.B. 89, 94, 58 L.R.R.M. 1354; *Longshoremen's Union (Motor Transport, Inc.)*, (1960) 127 N.L.R.B. 35, 45 L.R.R.M. 1501.

Courts: E.g., *N.L.R.B.* v *Local 25, IBEW*, (2d Cir. 1967) 383 F.2d 449; *NLRB* v. *Local 825, Int. U. of Operating Engineers*, (3d Cir. 1964) 326 F.2d 213; see *NLRB* v. *Operating Engineers*, (1971) 400 U.S. 297, 305.

[12] See Hickey, *Subcontracting Clauses*, 40 Notre Dame Lyr. 377, 383 (1964): "The construction industry is built upon the subcontracting of work which is the rule and not the exception. It is uneconomical for a general contractor to assemble and maintain the special equipment and specialized personnel needed for a particular job. Typically, the general contractor bids on and receives an overall project and then subcontracts for various specialties." See also Comment, *Impact of the Taft-Hartley Act*, 60 Yale Law J. 673, 679 (1951).

[13] O'Donoghue, *Jurisdictional Disputes*, 52 Geo. L. J. 314, 336 (1963).

2. The court's decision will prevent the Board from finally resolving jurisdictional disputes throughout the construction industry, contrary to the congressonal purpose and the statutory responsibility of the Board.

The importance of reviewing a decision that draws this irrelevant distinction in the case of subcontracted work can scarcely be overstated. In the construction industry, subcontracting is the routine method of performing the work.[12] "Jurisdictional disputes in this industry more often than not involve two employers, as well as two groups of employees, represented by different unions"[13] and "in the construction industry . . . the selection of a subcontractor is equivalent to an

assignment of work."[14] It follows that forcing the selection of a different subcontractor is equivalent to forcing a reassignment of the subcontracted work — in this case, to members of the union whose claim to it was rejected by the Board.[15]

The Board is "directed" by § 10(k) to finally "determine" the dispute. In this industry, it can do so and will achieve the congressional objective that "the underlying jurisdictional dispute" be "settled permanently," *CBS*, supra, 364 U.S. at 577, 581, only if its decision embraces both the general contractor and the subcontractor who are involved in it. The court's decision makes § 10(k) awards meaningless in the construction industry whenever the work is assigned through subcontractors.

3. The court's decision is an abrupt and unfortunate departure from the policies and standards for settling jurisdictional disputes that have been established by Congress in § 10(k).

In its § 10(k) decision, the Board proceeded in accordance with *CBS*, on the basis of a full record which included but was not limited to the contending

[14] *Printing Pressmen's Union (Metropolitan Printing Co.)*, (1974) 209 N.L.R.B. 320, 321, 85 L.R.R.M. 1586. See also Dunlop, *Jurisdictional Disputes*, 2d Ann. N.Y.U. Conference on Labor 477, 486-487 (1949): "Because of the relations between particular specialty contractors and unions, the letting of a contract is also a work assignment."

[15] Under the Act, § 10(k) applies to an attempt by a union to force "*any*" employer, whether or not it is an employer of either contending group of employees, to assign disputed work to its members. *Longshoremen (Calif. Cartage Co.)*, supra, (1974) 208 N.L.R.B. 986, 990, 85 L.R.R.M. 1289.

labor agreements. Having done so, it awarded the work to Teamsters. Under the court's decision, however, the work will now be assigned to members of 701, based solely on that union's separate contract with AGC — even though under *CBS* its contract is not to be decisive of the dispute.[16]

The court has not implemented the Board's decision to achieve a final settlement of the underlying jurisdictional dispute, but has perpetuated the dispute before arbitrators and the courts, through proceedings to enforce clauses in the losing union's contract. The undesirable result is that controversies between rival unions will erupt in conflicting negotiating demands for subcontract and work-assignment clauses in labor agreements, and in arbitration and court proceedings to interpret them, regardless of the jurisdictional rights of the parties as established by the Board. This is inconsistent with the legislative intent "to place the responsibility for compulsory determination of the dispute entirely on the Board." *CBS*, supra, 364 U.S. at 581-582.

It is a further undesirable consequence of the court's decision that the jurisdictional rights of one of the contending unions will be determined in negotiations and legal proceedings from which it is excluded.[17] Thus, in this case the jurisdictional rights

[16] ". . . This language [of 10(k)] also indicates a congressional purpose to have the Board do something more than merely look at . . . a collective bargaining contract. . . ." *CBS*, supra, 364 U.S. at 579.

[17] To the extent that contracts with general contractors might resolve the dispute, they would deprive subcontractors'

of Teamsters are decided in negotiations and in arbitration or court proceedings between AGC and 701. Congress, however, required that jurisdictional disputes be resolved in proceedings in which all interested parties participate; the only exception to the Board's mandate under § 10(k) to hear and determine the entire dispute is when *all* parties have agreed to a voluntary alternative method of resolving it. *NLRB* v. *Plasterers' Local Union*, (1971) 404 U.S. 116.

Under the court of appeals' decision, jurisdictional disputes involving subcontracted work in the construction industry will thus be resolved in the wrong forum, with the wrong parties and on the wrong basis. The forum will be private arbitration and the courts, although these disputes are "entirely" the Board's responsibility. *CBS*, supra, 364 U.S. at 581-582. The participating parties will include only one of the competing unions, although § 10(k) requires the participation of all interested parties. *Plasterers*, supra, 404 U.S. at 137. The basis of the decision will be the labor contract, although the contract is not to be controlling under the Act. *CBS*, supra, 364 U.S. at 579.

Finally, the decision will be subject to revision by contract, so that the underlying dispute cannot be finally resolved. In *CBS*, the Court explained the consequences of such a rule: "the same old basic jurisdictional dispute likely continuing . . ., and the rival unions, short of striking, would still be free to adopt other forms of pressure upon the employer." 365 U.S. at 579-580.

employes of their right to select their own union representative. The union that represents employees of both the general and the subcontractor will freeze out the union that represents only subcontractor employees, since the latter are not represented at the general's bargaining table and cannot seek a subcontractor clause. The importance of including all contesting unions in relevant contract negotiations has been recognized. Player, *Work Assignment Disputes*, 52 Tex. L. R. 417, 439 (1974); see also the dissenting opinion of Justice Black in *Carey*, supra, 375 U.S. at 274.

4. The Court should consider whether contract work assignment clauses operating through a subcontractor clause are preempted, just as direct work assignment clauses are, by the "superior authority" of the Board's § 10(k) decision.

a. Unions routinely bolster their jurisdictional claims with contract clauses asserting their right to disputed work. In industries in which little work is done by subcontractors, a direct work-assignment clause requiring that it be assigned to employees of the employer who are covered by the union contract is sufficient. However, in an industry in which work assignments are made by subcontracting, the union's jurisdictional objective requires, in addition, a subcontractor clause obligating the employer to subcontract only to firms whose employees are covered by the same union contract.

For all purposes material to § 10(k), these indirect work-assignment clauses (which operate through subcontractor clauses) are indistinguishable from direct work-assignment clauses and should be equally subject to the "superior authority" of the Board's § 10(k) decision in disputes involving subcontracted work. Both kinds of clause have the same jurisdictional ob-

jective and the same practical effect in their respective industrial settings, and it is inconsistent and undesirable for a § 10(k) order resolving a jurisdictional dispute to preempt one but not the other.

b. The court below confined the Board's superior authority to jurisdictional disputes involving only one employer, by enforcing a contract clause requiring the employment of subcontractors who employ the losing union's members. A direct work-assignment clause is conceded by the court to fall before the Board's decision (so that the union losing in the § 10(k) proceeding could not enforce its work assignment clause directly against an employer which has its own employees perform the work in accordance with the Board's award); yet the court holds that a subcontractor clause is immune from the Board's award. However, both clauses have the same jurisdictional objective and effect, and under the Act both must be subject to the Board's superior authority.

Furthermore, a subcontractor clause can only control an assignment of disputed work if the labor contract required of the subcontractor contains an effective work-assignment clause. Under the decision of the court of appeals, the Board's § 10(k) decision preempts the work-assignment clause as applied to an employer's own employees, but does not preempt the same clause as applied to the same work when it is performed by a subcontractor's employees.

It is only in the construction and garment industries that this anomalous result is possible, because the

provisos to § 8(e) of the Act allow judicial enforcement of subcontractor clauses in those industries. In all other industries, a subcontractor clause is "unenforceable and void" under § 8(e). But the provisos to § 8(e) were not intended to undermine § 10(k) jurisdictional awards; they were concerned with the distinct problem of secondary boycotts.[18] Indeed, the provisos reflect the understanding of Congress that these industries traditionally operate through subcontracting. The § 8(e) construction proviso was not intended to affect the finality and superiority of § 10(k) awards that involve both a contractor and a subcontractor.

The court of appeals' reasoning — that enforcement of the subcontractor clause is permissible because the general contractor can avoid the Board's § 10(k) decision by refusing to subcontract to Northwest members — destroys the Board's capacity to resolve jurisdictional disputes involving subcontractors. The court's decision merely permits the losing union to overrule an adverse § 10(k) decision involving subcontracted work by the device of securing and enforcing a standard form of subcontractor clause.

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[18] See *N.L.R.B.* v. *Operating Engineers*, supra, (1971) 400 U.S. 297.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: May 7, 1976

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., OREGON-COLUMBIA CHAPTER,
Plaintiff-Appellee,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 701,
Defendant and Third-Party Plaintiff-Appellant,

and

NORTHWEST CONCRETE PUMPING ASSOCIATION, INC., et al.,

and

JOINT COUNCIL OF TEAMSTERS NO. 37, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Defendants-Appellees,

HANS JUHR, et al.,
Third-Party Defendants-Appellees.

No. 74-2687

OPINION

[January 28, 1976]

Appeal from the United States District Court
for the District of Oregon
Before: DUNIWAY and SNEED, Circuit Judges,

and WEIGEL,* District Judge
DUNIWAY, Circuit Judge:

Associated General Contractors (AGC) brought this action in the district court to reform certain work assignment provisions of its collective bargaining agreement with the International Union of Operating Engineers, Local 701, and to enjoin Local 701 from seeking arbitration of grievances related to those provisions. Local 701 counterclaimed under § 301 of the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. § 185 (1970), for damages for breach of contract. The district court entered judgment for AGC, dismissing Local 701's counterclaim "on the merits," and holding that a prior ruling of the National Labor Relations Board pursuant to § 10(k) of the LMRA, 29 U.S.C. § 160(k) (1970), reported at 205 N.L.R.B. 383, precluded Local 701 from suing for damages under § 301 and effectively barred its only defense to AGC's complaint. Local 701 appeals and we reverse.

This case concerns the operation of concrete pumps in Oregon and eastern Washington. Both the Joint Council of Teamsters No. 37 and Local 701 represent concrete pump operators in the region. In June of 1970 and 1973, AGC and Local 701 entered into collective bargaining agreements which provided, *inter alia*, that:

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* The Honorable Stanley A. Weigel, United States District Judge for the Northern District of California, sitting by designation.

1. "Crews on concrete pumps shall consist of an Operating Engineer." and

2. "No contractor . . . covered by the terms and conditions of this Agreement shall subcontract any work to a subcontractor or employer who is not signatory to this Labor Agreement."[1]

The purpose of these provisions is to insure that only members of Local 701 would operate concrete pumps at sites where an AGC member was the general contractor.

In 1972 Western-Pacific Piledriving Corp., a member of AGC and thus a party to the agreement, subcontracted the concrete pumping work at the Trojan Nuclear Power Plant in Oregon to Pump-Con, Inc. Pump-Con was not a signatory to the AGC-Local 701 agreement, but was a member of the Northwest Concrete Pumping Association (Northwest), which had an agreement with the Teamsters Union substantially similar to that between AGC and Local 701. It provided that Northwest members would employ only members of the Teamsters to operate concrete pumps. A dispute between Local 701 and the Teamsters over which contract would predominate was inevitable.

Pump-Con employed a Teamster to operate its concrete pump, prompting Local 701 to file a grievance with Western-Pacific. A Board of Adjustment, as provided in the AGC-Local 701 agreement, heard the grievance and ruled that the disputed work was to be performed by a member of Local 701. To protect its

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[1] The quoted language is from the 1970 agreement. The 1973 contract is substantively identical.

position, the Teamsters threatened a strike. In response Western-Pacific filed an unfair labor practice charge with the NLRB against the Teamsters. *See* LMRA § 8(b)(4)(D), 29 U.S.C. § 158(b)(4)(D) (1970).

The dispute was heard before the NLRB, which determined that the concrete pumping work on the Trojan Nuclear Power Plant site properly belonged to the Teamsters. Joint Council of Teamsters No. 37, 1973, 205 N.L.R.B. 383. In addition, at the request of Northwest, the NLRB expanded the scope of its order to cover all situations in which members of the Northwest performed concrete pumping work for AGC contractors. *Id.* at 386.

Local 701 notified the Board of its intent to comply, but continuted to file grievances against AGC members who subcontracted pumping work to members of Northwest. In essence, Local 701 maintained that the NLRB order, while requiring members of Northwest to use Teamsters members on their concrete pumps, did not relieve AGC members of their obligations under the collective bargaining agreement to subcontract with signatories of the AGC-Local 701 agreement and thus, by implication, not to contract with members of Northwest.

To avoid arbitration, which it contended would be fruitless, AGC filed this action for declaratory and injunctive relief. Local 701 answered and later counterclaimed for damages for breach of contract. The district court, relying on *NLRB* v. *Radio & Television*

Broadcast Engineers Local 1212, 1961, 364 U.S. 573 [*CBS*] and *New Orleans Typographical Union No. 17* v. *NLRB*, 5 Cir., 1966, 368 F.2d 755, held that the NLRB order awarding the work to the Teamsters required it to dismiss Local 701's counterclaim and grant AGC the relief it sought, including reformation of the AGC-Local 701 contract to eliminate the provision that we have quoted above, insofar as it prevents subcontracting with members of Northwest.

In 1947, responding to a wave of post-World War II strikes, Congress sought to establish a process by which to resolve labor disputes without costly work stoppages. LMRA § 1(b), 61 Stat. 136 (1947). Among those evils which received attention in the Labor Management Relations [Taft-Hartley] Act of 1947 were jurisdictional disputes. While the Taft-Hartley Act was the subject of acrimonious debate and a presidential veto, all sides agreed that strikes by one union to compel an employer to assign it work being performed by another union were counterproductive. The mechanism by which Congress sought to eliminate jurisdictional strikes was § 10(k) of the LMRA, 29 U.S.C. § 160(k). *See* O'Donoghue, Jurisdictional Disputes in the Construction Industry Since *CBS*, 1964, 52 Geo. L. J. 314, 316-18. To effectuate the purposes of § 10(k), it is essential that once an NLRB order becomes final, no court—state or federal—be permitted to impair compliance with it. *Garner* v. *Teamsters Local 776*, 1953, 346 U.S. 485, 490-91; Sovern, Section 301 and the Primary Jurisdiction of the NLRB, 1963, 76 Harv. L. Rev. 529, 544-50. This

means that the Board's decision, so far as actual assignment of the work to one union or the other is concerned, preempts the contract provision.

In this case the parties dispute whether the preemption doctrine so far applies as to render the contract provision invalid for all purposes. We hold it does not. If Local 701 were suing Northwest to compel it to use members of Local 701 rather than Teamsters to operate concrete pumps, it is clear that the NLRB order would preclude relief in this court. *New Orleans Typographical Union No. 17, supra,* 368 F.2d at 767. If Local 701 were suing Northwest for damages, it is arguable that the court would be required to abstain. *Carey* v. *Westinghouse Electric Corp.*, 1964, 375 U.S. 261, 272 (dicta); *but cf. Local 1547, IBEW* v. *Local 959 Teamsters,* 9 Cir., 1974, 507 F.2d 872, 878-79 (award of damages for violation of "no raid" agreement between unions may be proper in some cases, even though the NLRB has held an election in which the employees favored the raiding union.) In both hypothetical situations a judgment in favor of the union which lost before the NLRB could place the employer "between the devil and the deep blue," *CBS, supra,* 364 U.S. at 575, forced either to violate the NLRB's order or the court's decree.

The cases cited by AGC all involve a single employer caught between the conflicting demands of two or more unions. *See, e.g., Local 416, Sheet Metal Workers* v. *Helgesteel Corp.*, 7 Cir., 1974, 507 F.2d 1053; *Local 7-210, OCAW* v. *Union Tank Car Co.*, 7

Cir., 1973, 475 F.2d 194, *cert. denied* 414 U.S. 875; *Ironworkers Local 395* v. *Lake County Bhd. of Carpenters,* N.D. Ind., 1972, 347 F. Supp. 1377; *Dock Loaders Local No. 854* v. *W. L. Richeson & Sons, Inc.,* E.D. La., 1968, 280 F. Supp. 402.

This case does not involve these intractable problems. The AGC, if Local 701 were to prevail on remand, would not be faced with the choice of violating an NLRB order or paying damages. If AGC members used only subcontractors signatory to the AGC-Local 701 contracts and so bound to employ members of Local 701 on their concrete pumps, i.e., non-members of Northwest, they would fulfill their contractual obligations to Local 701 under the Collective Bargaining Agreement without at the same time violating the NLRB order. If an AGC member subcontracts the concrete pump work with a member of Northwest, the Teamsters will be entitled to man the pumps. But there is no legal obligation upon an AGC member to contract with a member of Northwest. By refraining from doing so, and contracting with a subcontractor who is a party to the AGC-Local 701 agreement, the AGC member avoids any breach of the contract with Local 701. Nothing in the NLRB decision purports to prevent AGC members from complying with the AGC-Local 701 agreement. All that the Board held is that if an AGC member does breach the AGC-Local 701 agreement by subcontracting with a member of Northwest, the Teamsters will get the work. It is the making of such a subcontract which breaches the AGC-Local 701 contract. In such a case, because of the

Board decision, Local 701 cannot force the employment of its members on the job. The Board's decision does, to that extent, preempt the AGC-Local 701 agreement. But this does not mean that Local 701 cannot get damages for the breach. That question was not before the Labor Board and was not decided by it. The rationale for preemption, avoiding the creation of conflicting or incompatible standards of conduct, *Vaca* v. *Sipes*, 1967, 386 U.S. 171, 180-81, is thus not present here.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

APPENDIX B

ORAL OPINION OF THE DISTRICT COURT ON FEBRUARY 25, 1974 (R. 339-346)

THE COURT: Gentlemen, because of the time factor involved, we had indicated earlier that the 60-day injunction was intended to be for a limited period of time for reasons which were described at the time. At least my thinking was, at the time, that given the fact that the nine grievances which were the subject of the injunction, many of them had been pending for a substantial period of time that, that the interference with the arbitration grievance procedure would be comparatively minimal in enjoining the matter for a 60-day period.

You Gentlemen were kind enough to cooperate with the Special Master in stipulating to the facts that were contained in the stipulation and which, I guess probably have become a part of the record. At least a transcript of the proceedings was filed. And then, of course, you Gentlemen were kind enough to make yourselves available for the hearing here today so that we can meet the 60-day deadline.

Consequently, the matter, if it can be decided, should be decided. I propose to do so here today either fortunately or otherwise. I feel that a prompt disposition of the dispute, and particularly a disposition of the dispute while the participants, not merely the lawyers are present is preferable. I could take the time to write an opinion on this. All that would mean is that

this and other cases would be disposed of more slowly because of the amount of time it takes me personally to write opinions. And while the grammer won't be as all arranged in apple-pie order, this is what I would say to you if I took time to write an opinion:

Number One, I am satisfied that on the basic dispute here, that the Plaintiff is entitled to prevail. And I hold generally in the Plaintiff's favor for these reasons: Number One, in my judgment, the Congressional policy which favors the settlement of jurisdictional disputes by resorting to the dispute-settling machinery of the NLRB is one which takes precedence over the dispute-settling mechanism of the individual contractor and the grievance and arbitration procedure thereunder.

I am satisfied from the radiation of the *CBS* case, and particularly I find persuasive the language of the Fifth Circuit in the *New Orleans Typographical* case which is cited in Mr. Scott's memorandum. This language from the Fifth Circuit says, and I am reading from Page 767 of 368 F2d:

> "We are of the opinion, of course, that once the determination is made and becomes final, then it takes precedence over the 301 arbitration proceedings. When the union struck to enforce the work assignment, it removed the controversy from the field of private contractual rights into the higher ambit of public rights. When the Board acted, its order was entitled to precedence. Congress definitely intended that a 10-K determination should be a permanent settlement of the dispute. . . ."

— citing the *CBS* case —

> ". . . the judgment of the Court under 301 must yield to the final determination of the Board."

That, of course, was a case in which there were conflicting rules: One by the Board, and one by the Court in a contest not dissimilar to ours. Consequently, it seems to me that the Congressional policy is to have those disputes, which are commonly clustered together to write opinions. And while the grammar won't be under the umbrella language of judicial disputes are for the Board. And in those cases in which the Board finds and concludes that it has jurisdiction, and in fact, exercises that jurisdiction, that jurisdiction supersedes or precedes the jurisdiction which normally would belong to an arbitrator or to a grievance committee under arbitration grievance proceedings under collective bargaining agreements.

It seems to me that it has to be this way, at least for some of the disputes. I don't know what my decision would have been in this case if the Board had not gone ahead to use the similarly-disputed language that it did. But the Board saw fit to do so, and neither party saw fit to act in a way in which the Board would seek to compel compliance with its order through court proceedings.

Therefore, that determination by the Board has become final. And in my judgment, the Congressional policy is fulfilled better by concluding that it has priority over the grievance procedure. Consequently, since

I think the record is clear here that those matters concerning which grievances were sought prior to the August date of the Board's order, those disputes are foreclosed from the otherwise available grievance procedure. And that includes, I believe, if I am not mistaken, seven of the nine which are involved here.

I cannot believe, although there are people in San Francisco who are wiser than I, and they may conclude differently, but I cannot believe that the August date should be a cutoff time. And therefore, I conclude and hold that the late disputes — these were the two November disputes concerning which grievance procedures were invoked are similarly foreclosed by the Board's 10-K order because I believe that it is Congressional policy for there to be some positive application of a given Board decision.

Fortunately, in the contentions of this litigation, I do not need to explore the boundaries. And even though I asked you Gentlemen some hypotheticals, I did so merely to clear up my own thinking and not to indicate that I am going to go beyond the matters specifically involved in this controversy.

I don't know how long the Board's order takes precedence and I don't have to rule. I have difficulty enough ruling on the issues presently before me. I am not going to borrow trouble, so I don't need to decide whether some were down - the - road changes in circumstances, changes in contractual language, changes indeed in certification, and the whole host of matters may bring about conditions under which the

Board's 10-K order would not long have any validity or might have less validity. It is sufficient for the purpose of this dispute to hold, as I do, that the nine grievances which are the subject of the preliminary injunction do not have pretense over the Board order, and rather the convers is true, and consequently, the Plaintiff properly seeks the injunctive power of the Court to enjoin further proceedings in connection with those nine grievances.

And I should say, also, that to whatever extent factual findings are involved in this oral opinion, this will be treated as findings and conclusions, a copy of it would be prepared by the court reporter and filed with the Clerk of the Court and they will be treated as findings and conclusions under Rule 51.

I further find and hold that the question of availability, which Mr. Willner suggested was in the case is irrelevant. If I am legally incorrect in this decision, I think Mr. Willner has had adequate opportunity to make and has made a sufficient offer of proof so that the question of availability, if the case goes on appeal, is one which could be decided. I don't make any findings as to availability because I think it's irrelevant.

It is apparent from the testimony here today that on some of the given grievances involved, no doubt had the AGC members sought out Mr. Moravek and other pumping contractors like him, that at least some of the projects were within the capability of performance by Mr. Moravek and the others, who were called as witnesses by Mr. Willner.

On the other hand, some of the grievances — and here I refer to the facts which Mr. Smith got stipulations from you Gentlemen on — some of the facts indicated quite clearly that some of those contractors were involved in pumping operations of size and duration to lead me to believe that there certainly would not have been available for all AGC members, during the year 1973, sufficient pumping capacity by contractors who had a contract with 701.

In short, what I am saying is that if I had to make findings, I would make findings that some of these disputes centered around projects on which 701-oriented pumping contractors would be available and somewhere there was no such real availability. When I say "701-oriented," I mean of course, pumping contractors who had pumping contracts with 701.

Furthermore, though I don't think it probably necessary to find this decision, but maybe it is, I do not — I am not able from these proceedings to make any findings or suggesting that any of the AGC members involved in these nine disputes had their own equipment of such availability, and geographical location, that there is any reason to believe that a deliberate business choice was made to cut out 701 and favor the Teamsters. The key witness (Kiewit?) and the Drake examples do not, in my judgment, furnish evidence from which a fact finder could find that the contractor had equipment available and deliberately bypassed it so as to frustrate its obligations and 701's rights under the contract.

Furthermore, this was a contention that Mr. Willner made somewhere at the beginning of these proceedings. I do not agree that in those instances where 701 — excuse me, where AGC members sought out contractors with Northwest that there is any responsibility or liability for them to hire one person from 701; and consequently, I conclude against Mr. Willner on that contention.

The upshot of all of this is that I conclude for the reasons stated, that the preliminary injunction previously issued should be and is hereby made permanent; subject, of course, to whatever drafting may be necessary by counsel. And I think it probably — I don't know this, so I'd better say it only tentatively, I think probably the upshot of this is to also rule out, as a matter of law, the contentions which Mr. Willner has made in his counter-claim and cross-complaint. It may be, Mr. Willner, that there is something in your pleadings, in your affirmative pleadings that I have overlooked. But it occurs to me that the rulings which I have just announced disposes of the whole case. And it means, in effect, that as a matter of law, I am holding against you on the portion of your counter-claim in which you sought affirmative relief including the part which you asked for trial by jury. But maybe there is something there that I have overlooked, and so that is why I express this in tentative fashion. . . .

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., OREGON-COLUMBIA CHAPTER,
Plaintiff-Appellee,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 701,
Defendant and Third-Party Plaintiff-Appellant,

and

NORTHWEST CONCRETE PUMPING ASSOCIATION, INC., et al.,

and

JOINT COUNCIL OF TEAMSTERS NO. 37, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Defendants-Appellees,

and

HANS JUHR, et al.,
Third-Party Defendants-Appellees.

No. 74-2687

ORDER
[April 13, 1976]

Before: DUNIWAY and SNEED, Circuit Judges, and WEIGEL,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

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* The Honorable Stanley A. Weigel, United States District Judge for the Northern District of California, sitting by designation.

APPENDIX D

UNITED STATES OF AMERICA
205 N.L.R.B. 73 BEFORE THE NATIONAL LABOR RELATIONS BOARD

JOINT COUNCIL OF TEAMSTERS NO. 37, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, IND.

and

WESTERN-PACIFIC PILEDRIVING CORP.

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 701, AFL-CIO

[August 8, 1973]

Case 36—CD—98

DECISION AND DETERMINATION OF DISPUTE

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, based upon a charge filed by Western-Pacific Piledriving Corp., herein called the Employer or Western, alleging that Joint Council of Teamsters No. 37, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Ind., herein called Teamsters, has violated Section 8(b)(4)(D) of the Act. The charge alleges, in substance, that the Teamsters made threats of economic action in order to prevent the Employer from assigning the work of operating concrete pump trucks to members of International Union of Operating Engineers, Local 701, AFL-CIO, herein called Engineers, rather than to members of the Teamsters. Pursuant to notice, a hearing was held in Portland, Oregon, before Hearing Officer Richard V. Stratton, on February 20 and 21, 1973. All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to present evidence bearing on the issues.[1] Thereafter, the Employer, the Engineers, and Northwest filed briefs. The briefs have been duly considered by the Board.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this case, the Board makes the following findings:

I. The Business of the Employer

The Employer, an Oregon corporation with its principal office and place of business in Portland, Oregon, is engaged in the construction industry in several

[1] Northwest Concrete Pumping Contractors Association, herein called Northwest, was permitted to intervene as the bargaining representative of Pump Con, Inc., which was performing the work in dispute for the Employer by using members of Teamsters.

western States. It annually provides services in excess of $50,000 to employers outside the State of Oregon.

We find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organizations Involved

The parties stipulated, and we find, that Teamsters and Engineers are labor organizations within the meaning of Section 2(5) of the Act.

III. The Dispute

A. *Background and Facts of the Dispute*

The Employer was engaged by Christenson Electric Company, the general contractor, as a subcontractor to erect and place 80 concrete reinforced pilings 135 to 140 feet underground on the site of the Trojan Nuclear Power Plant being erected for Portland General Electric Company, near Rainier, Oregon, about 40 miles northwest of Portland, Oregon.

The Employer constructed the necessary forms for the purpose of pouring and containing the poured concrete, which was to be pumped through a boom and a flexible hose into a smaller "tremie" pipe[2] which led

[2] An apparatus for depositing and consolidating concrete (usually) under water, consisting essentially of a tube of wood or sheet metal. *Webster's Third New International Dictionary*, unabridged, 1966 ed., 2438.

to the bottom of the foundation piling under construction. For practical reasons it was decided to use this method of concrete pouring rather than a bucket, which is the customary device used for pouring concrete. Since the Employer does not own its own pumping equipment, it contracted for the services of Pump-Con, Inc., herein called Pump-Con, to pump the concrete into the forms. Pump-Con provided the Employer with a concrete pumper truck manned with an operator on a straight hourly basis. The operator was a member of the Teamsters.

Pump-Con is a member of Northwest, which is the current bargaining representative of Pump-Con and five other concrete pumping companies. Northwest has a current labor agreement with the Teamsters covering the operators of concrete pumper trucks, including the operator provided to the Employer by Pump-Con. The Employer is a member of Oregon-Columbia Chapter of the Associated General Contractors of America, Inc., herein called AGC, the bargaining representative of the construction contractors in the area, which has a current master labor agreement with the Engineers, the other Union party to the present dispute.

It is the operation at the jobsite of the concrete pumper truck — into the hopper of which concrete is poured from a ready-mix truck — that is in dispute in this proceeding. The current type and model of pumping equipment used on this kind of job can be manually or electrically operated and controlled by means

of a pushbutton device held in the hand of the operator and attached to an electrical line running to a control panel on the truck. Either manually or by pushing appropriate buttons the operator can unfold the boom, set it in the right direction and angle of elevation, and start and stop the pump at the appropriate times. The driver of the ready-mix truck controls the flow of concrete from the ready-mix barrel into the hopper of the pumper and must cooperate with the pumper operator to maintain a timely, adequate, and continuous flow of concrete. The type of equipment used is called a "Schwing" concrete pump and costs about $50,000.

When Pump-Con began to pour for the Employer, the Engineers by letter of November 3, 1972, informed the Employer, as a subcontractor on the site, that there existed a dispute between the Employer and the Engineers in that a nondispatched person was operating the concrete pump in contravention of article XV, section 16, of the agreement between the AGC and the Engineers, which provides: "CONCRETE PUMPS. Crews on concrete pumps shall consist of an Operating Engineer." By letter of November 7, the Employer replied disavowing any violation of this provision of the agreement on the ground that the concrete pump and operator were furnished by Pump-Con. Thereupon, the Engineers filed a grievance against the Employer pursuant to the grievance provisions of the AGC agreement and the matter was referred, as provided therein, to a Board of Adjustment for hearing and decision. The Employer was represented at the hearing. On November 16, 1972, the Board of Adjustment ruled that the operation of concrete pump trucks belonged to the Engineers because of the above quoted provision of article XV, section 16. The ruling was also based on an agreement between the Engineers and Teamsters International Unions. The presidents of the International Unions had agreed on June 1, 1969, in pertinent part, as follows:

Article XV

Truck-Mounted Concrete Pump and Concrete Placers

> The operation of pumps and placers mounted on trucks or skids that are used to pump and place concrete on the construction jobsite is recognized as the jurisdiction of the Operating Engineers.

In the light of the ruling of the Board of Adjustment, the local Oregon-Columbia chapter of the AGC advised its members by a labor bulletin on November 21, 1972, that future actions to the contrary of the ruling of the Board of Adjustment could result in a violation of the AGC-Engineers agreement. The Teamsters representative then threatened to shut down the job if the Employer were to attempt to force a reassignment of the work from members of the Teamsters to members of the Engineers.

B. *The Work in Dispute*

The work in dispute is the operation of the concrete pumper at the Trojan Nuclear Power Plant Project located near Portland, Oregon.

C. *Contentions of the Parties*

The Employer, Northwest, and the Teamsters contend that the disputed work should be assigned to members of the Teamsters on the basis of the collective-bargaining agreement between Teamsters and Northwest, industry and area practice, relative skills of the disputing employees, and economy and efficiency of operations.

The Engineers argues that the disputed work should be assigned to its members in view of the provisions of the AGC-Engineers collective-bargaining agreement and the determination of the Board of Adjustment made thereunder that members of the Engineers were entitled to operate the concrete pumper at the Trojan jobsite.

D. *Applicability of the Statute*

The parties stipulated, and we find, that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated by the Teamsters threat to shut the job down if the operation of the concrete pumper was assigned to a member of the Engineers.

The parties have not agreed upon a method for settling this jurisdictional dispute. Although a Board of Adjustment under the AGC-Engineers collective-bargaining contract determined that a member of the Engineers was entitled to operate the concrete pumper mounted on a truck, neither the Teamsters nor Northwest was a party to that proceeding. Accordingly, that determination is not dispositive of the jurisdictional dispute.

In view of the foregoing, we find that the matter is properly before the Board for determination under Section 10(k) of the Act.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of the disputed work after giving due consideration to all relevant factors. We find the following factors are relevant to making a determination of the dispute before us.

1. Certifications and collective-bargaining agreements

Neither labor organization has been certified as the collective-bargaining representative of employees performing the disputed work. Each Union has a collective-bargaining contract with one of the employers involved. The Engineers has such a contract with the AGC to which the Employer is bound by virtue of its membership in the AGC. This contract purports to cover operators of concrete pumpers at construction sites. On the other hand, Pump-Con is a member of Northwest which has a collective-bargaining contract with the Teamsters covering the same category of employees. Under these circumstances, the factors of certifications and collective-bargaining agreements favor neither party.

2. Agreements between Internationals

On June 1, 1969, the Teamsters and Engineers Internationals entered into a "Construction Site Jurisdictional Agreement," whereby the two parties agreed, *inter alia*, that the operation of pumps mounted on trucks to pump and place concrete was recognized as coming within the jurisdiction of the Engineers. In November 1972, this agreement was reaffirmed. However, Respondent Teamsters thereafter notified its International that it has a collective-bargaining agreement with Northwest covering employees performing the disputed work through April 30, 1974, and that it intended to abide by that agreement. The agreement between the Internationals is thus a factor favorable to the Engineers, mitigated to some extent by Respondent Teamsters' unwillingness to accept that agreement as requiring it to repudiate its collective-bargaining contract with Northwest.

3. Company and area practice

The Employer purchased the concrete pumping service, including service of the operator, from Pump-Con on a straight hourly basis. It has in the past similarly purchased the services of pumper and operator from Pump-Con and other members of Northwest. It is the accepted industry practice in the area for small subcontractors such as the Employer to purchase concrete pumping service, including the services of the operator, from one of the members of Northwest when they have temporary need for such services. As stated,

the operators furnished by the Northwest members are represented by the Teamsters. Company, industry, and area practice thus favor a determination in favor of the Teamsters.

4. Relative skills, efficiency, and economy of operation

The Employer and Northwest strongly favor an award of the disputed work to the employees of Pump-Con represented by the Teamsters because of their experience in performing the work and the resulting efficiency and economy of operation. Teamsters have performed the disputed work for members of Northwest including Pump-Con since 1968. Moreover, the present teamsters employees of Pump-Con were the first employees hired by it to perform this work and they have had several years experience performing it. They also possess chauffeurs' licenses which they must have in order to drive the pump trucks on public highways to and from the construction sites they work at. Engineers, so far as the record shows, do not possess such licenses and their craft does not require them to secure them. Neither of the contending Unions provides its members with formal training in the operation of concrete pumps; rather, skills are attained through on-the-job training. Thus, Pump-Con used 12 weeks at a cost of about $3,000 per employee to train the present pump operators. Pump-Con would have to bear the burden and expense of training additional employees to perform the work properly. We are, therefore, persuaded that the factors of experience,

training, efficiency, and economy of operations favor an award of the disputed work to the employees of Pump-Con who are represented by the Teamsters.

Conclusion

Upon the entire record in this proceeding and after full consideration of all the relevant factors, in particular, the practice of the Employer, Pump-Con, and other employers in similar situations in the area, the experience of the members of the Teamsters in performing the disputed work, and the efficiency and economy of operation, we conclude that the employees of Pump-Con who are represented by the Teamsters are entitled to the work in question and we shall determine the dispute in their favor. In making this determination, we award the work to the employees of Pump-Con who are represented by the Teamsters but not to that labor organization or its members.[3]

[3] See *International Association of Bridge, Structural and Ornamental Iron Workers, Local 29, AFL-CIO (Fabindustries, Inc.)*, 199 NLRB No. 34; and *Industrial Manufacturing and Maintenance Employees' Union No. 2241, Laborers' International Union of North America, AFL-CIO*, 202 NLRB No. 126.

Scope of the Award

Northwest argues that the dispute between the two Unions extends beyond the Trojan jobsite and the award should be as extensive as the dispute. There appears to be considerable merit in this contention. The Engineers claim to the disputed work rests on the language of the AGC-Engineers collective-bargaining

agreement as well as on the Board of Adjustment determination made thereunder. On the other hand, the Teamsters claim to the work is based on its collective-bargaining contract with Northwest. The dispute at Trojan is thus merely an incident in the basic disagreement between the parties. Unless our jurisdictional determination is coextensive with the area of dispute, it is likely to recur at other jobsites. Accordingly, our determination will be coextensive with the jurisdictional areas of the two contending labor organizations.[4]

[4] *International Association of Bridge, Structural and Ornamental Iron Workers Local 29, AFL-CIO (Fabindustries, Inc.), supra.*

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board hereby makes the following Determination of Dispute:

Employees employed by Pump-Con, Inc., or by way of the other present members of Northwest Concrete Pumping Contractors Association who are represented by Joint Council of Teamsters No. 37, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Ind., are entitled to perform the work in dispute which consists of the operation of concrete pumper trucks at the Trojan Nuclear Power Plant jobsite located near Rainier, Oregon, and

any similarly disputed work performed by the present members of Northwest Concrete Pumping Contractors Association, wherever the territorial jurisdiction of Joint Council of Teamsters No. 37, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Ind., and of International Union of Operating Engineers, Local 701, AFL-CIO, coincides.

Dated, Washington, D. C., August 8, 1973.

(SEAL)

Supreme Court, U. S.
FILED
JUN 9 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court

of the United States

OCTOBER TERM, 1975

No. 75-1626

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., OREGON-COLUMBIA CHAPTER, JOINT COUNCIL OF TEAMSTERS NO. 37, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, NORTHWEST CONCRETE PUMPING ASSOCIATION, INC., and HANS JUHR, KENNETH J. JUHR and DAN JUHR, dba JUHR & SONS, et al.,
Plaintiffs-Petitioners,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 701,
Defendant-Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a jurisdictional award of work by the NLRB automatically preempt all provisions of the losing union's collective bargaining agreement even if the employer can comply with the terms of the agreement without violating the Board's award?

STATUTES INVOLVED

In addition to those statutes cited in the petition this case involves the following provision of the Labor Management Relations Act, 1947, as amended by Public Law 86-257, 1959:

Sec. 301(a), 29 U.S.C. § 185(a), 61 Stat. 156:

Sec. 301(a). Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Petitioners' statement of the case is incorrect or misleading in the following respects:

1. Petitioners infer that subcontractors employing members of Respondent, Operating Engineers Local 701 (701), cannot supply the industry's needs and perform only a small portion of the concrete pumping work in the relevant area. Such facts are not supported by the record which reflects that many contractors within 701's geographic jurisdiction employ 701 members to operate concrete pumps or subcontract such work to employers employing 701 members. In addition, while such factors may be relevant as an affirmative defense to 701's breach of contract actions against Petitioner, Associated General Contractors of America, Inc., Oregon Columbia Chapter (AGC), they are not relevant to the question of whether or not the NLRB's 10(k) decision in this case automatically preempts the subcontracting provisions of the 701-AGC Collective Bargaining Agreement.

2. Petitioners state that all interest parties appeared before the National Labor Relations Board in the hearing held under § 10(k) of the Act. This is not correct since those independent contractors employing 701 members were not represented.

3. Petitioners characterize the Court of Appeals decision in this matter as one which was entirely dependent upon the fact that there was a subcontractor versus a single employer. Such is simply not the case. The court's decision below was properly based upon its conclusion that AGC contractors could fully comply with their collective bargaining agreement with 701 without in any way subverting or violating the Board's previous 10(k) decision.

REASONS FOR DENYING THE WRIT

The Court of Appeals decision is consistent with prior decisions of this Court and other courts of appeals. The decision strikes a proper balance between the objectives of Section 10(k) and Section 301 of the Act, since under the unique facts of this case both sections can be given their full effect without conflict.

1. The Court of Appeals decision in this case is consistent with prior decisions of this court and of other courts of appeal, since there was no conflict between the Board's award and the collective bargaining agreement which 701 seeks to enforce in this action.

Petitioners have cited numerous cases in support of their claim that the § 10(k) decision in this case precludes the § 301 claim of 701. A close reading of those cases, however, indicates that they are not factually similar to the one now under consideration. Those cases cited by petitioners each involve an employer with contractual commitments to two unions, who was caught in the middle of competing work assignment claims by the rival unions. (See e.g., *NLRB* v. *Radio and Television Broadcast Engineers Union*, 364 U.S. 573 [1961]); *New Orleans Typographical Union No. 17* v. *NLRB*, 368 F.2d 755 [5th Cir. 1966]).

Under the unique facts of this case, the AGC employer has no agreement with the rival union (Teamsters) covering this work. In fact, the Teamsters have no claim whatsoever to the work, unless and until an AGC employer has breached its collective bargaining agreement and subcontracted work to a member of the Northwest Concrete Pumping Association (Northwest). Absent such a voluntary decision, the Teamsters have no claim to the work, either in contract or under the Board's 10(k) award. As a result, there can be no conflict between the Board's award and the collective bargaining agreement unless an AGC employer deliberately chooses to breach its collective bargaining agreement.

Thus, under the facts of this case, the decision of the Ninth Circuit Court of Appeals is entirely consistent with prior decisions of this Court, which have uniformly held that the authority of the Board over unfair labor practices does not destroy the jurisdiction of the courts in suits under § 301. (*Smith* v. *Evening News Association*, 371 U.S. 195 [1962]). The remedies of § 10(k) (Administrative award of work) and of § 301 (Damages), as well as the jurisdiction of each tribunal, are independent. [*International Longshoremen's and Warehousemen's Union* v. *Juneau Spruce Corp.*, 342 U.S. 237 (1952); *Fibreboard Paper Products Corporation* v. *East Bay Union of Machinists Local 1304*, 344 F.2d 300 (9th Cir. 1965), cert. den., 382 U.S. 826 (1965)]. In addition the decision below is consistent with the fundamental policy announced by this Court favoring enforcement of arbitration provisions in collective bargaining agreements. (*Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 [1957]). It is thus clear that wherever possible every effort should be made to give complete effect to the collective bargaining agreement, so long as it does not directly conflict with a prior decision of the Board. The doctrine of preemption should not be applied unless such a conflict exists. Under the unique facts of this case there is no such conflict.

2. The Court of Appeals decision is consistent with the policies of the National Labor Relations Act.

Petitioners devote the majority of their brief to the proposition that decision of the Ninth Circuit

Court of Appeals in this case subverts the policies underlying § 10(k) of the Act. A review of those policies reveals that the fundamental purpose of § 10(k) is to eliminate the disruption of work caused by jurisdictional strikes and to aid the employer helplessly caught in the middle of conflicting demands by rival unions. (*NLRB* v. *Radio and Television Broadcast Engineers Union*, 364 U.S. 573, 580, 581 [1964]). It is submitted, however, that this policy will not in any way be "subverted" by a decision requiring employers to live up to the terms of their collective bargaining agreement, so long as such agreements are not in conflict with a prior jurisdictional award of work. If AGC contractors are required to hire subcontractors employing 701 members, the rival union (Teamsters) could not take economical legal action against AGC employers. This is, of course, the case, since the Teamsters (1) do not have a collective bargaining agreement covering such work, and (2) the Board's 10(k) order was limited to situations where the work had been subcontracted to members of Northwest. Thus, as pointed out above, the Teamster claim to the work arises only after an AGC employer has breached the collective bargaining agreement. If the AGC employer will not be subjected to economic action, nor to a claim for damages by the Teamsters, what public policy has been subverted by requiring them to comply with the terms of their contractual agreements.

Petitioners further argue that the Court of Appeals decision provides the means for unions to freely evade § 10(k) decisions by insisting on subcontractor

clauses. These clauses, however, are clearly permitted by the proviso to § 8(e) of the Act, and were found by Congress to be in the public interest. If a contractor, through the simple tact of subcontracting work to an employer who does not have an agreement with the union, can create a "jurisdictional dispute" all § 8(e) proviso type clauses in the construction industry would be rendered meaningless. Furthermore, in *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612 (1967), this Court approved contract language which preserved to the contracting union work traditionally performed by its members. Acceptance of the petitioners' position in this case would likewise render all such work preservation clauses vulnerable to the same devious tactic.

Petitioners also suggest that the Court of Appeals decision means that the "dispute" cannot be permanently settled. Such argument is deceptive and is not supported by the facts in this case. These facts are that a problem or dispute will not exist if the AGC employers comply with the terms of the 701 Collective Bargaining Agreement. Disputes will exist only so long as these employers voluntarily choose to disregard the terms of this agreement. The power to finally resolve the dispute is thus entirely within the control of the AGC employer.

The entire thrust of the National Labor Relations Act is to promote collective bargaining which culminates in private agreements, thus stabilizing the relationships between employers and employees. The Court

of Appeals decision in this case properly recognizes that if employers are free to disregard the terms of such agreements, the basic policy underlying the Act will be seriously affected. If employers are truely caught in the middle of competing unions, then certainly the policies underlying § 10(k) of the Act should relieve them from their dilemma. Here, however, the AGC employer is in the middle of a dispute only because it has voluntarily chosen to create the dispute in the first instance. Collective bargaining agreements are the heart of stable labor relationships. If employers, as they seek to do in this case, can unilaterally choose to disregard such agreements, the cornerstone of this country's labor management policies will have been destroyed. Clearly, such a result should not be approved by this Court.

CONCLUSION

Respondent respectfully submits that the judgment of the United States Court of Appeals for the Ninth Circuit is correct, works no injustice, and is founded upon unique facts which clearly remove it from any confusion among circuits concerning the proper role of the courts in enforcing collective bargaining agreements under § 301 of the Act and the National Labor Relations Board in resolving jurisdictional disputes under § 10(k) of the Act.

Respondent therefore prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Petitioners,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 701,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.

Reply to Statement of the Case (Res. Br. 2-3)

A. The district court rejected 701's contention that its members could meet AGC's needs for concrete pumping work. In its oral opinion based on a complete record, the court said:

> "Some of the facts indicated quite clearly that some of those contractors were involved in pumping operations of size and duration to lead me to believe that there certainly would not have been available for all AGC members, during the year

1973, sufficient pumping capacity by contractors who had a contract with 701. . . . [S]ome of these disputes centered around projects on which 701-oriented pumping contractors would be available and some where there was no such real availability." (Pet. A 32)

B. While contractors who employ 701 members were not parties to the § 10(k) proceeding, any interest they might have in the dispute was represented by 701. Their concern over competing with members of Northwest for subcontracts is not an interest that can be considered by the Board. See *Connell Co.* v. *Plumbers and Steamfitters*, (1975) 421 U.S. 418.

II.

While courts have jurisdiction under § 301 to enforce labor contracts (Res. Br. 5), the Board's § 10 (k) ruling is the "superior authority", and "if the employer's aciton [is] in accord with that ruling, it would not be liable for damages under § 301." *Carey* v. *Westinghouse Electric Corp.*, (1964) 375 U.S. 261, 272. The question, therefore, is not whether the subcontractor clause in the AGC-701 contract "directly conflicts" with the Board's decision. It is whether enforcement of the clause circumvents the Board's "superior authority" and makes its decision ineffective, contrary to national labor policy as applied to jurisdictional disputes. In the construction industry, which is characterized by subcontracting, the enforcement of a subcontractor clause nullifies an order under § 10(k) that awards such subcontracted work

and "all similarly disputed work" to another union.

III.

Respondent's concern (Res. Br. 7) for work preservation clauses, see *National Woodwork Manufacturers Association* v. *NLRB*, (1967) 386 U.S. 612, is misplaced, unless such clauses, as applied to subcontractors, are regarded as a means of eroding jurisdictional awards under § 10(k).* Awards under § 10 (k) admittedly are not controlled by a contract work assignment clause, and this kind of clause, like others, is subject to the "superior authority" of a Board decision determining that the work assignment it provides is not a proper one.

IV.

Respondent's contention (Res. Br. 6-8) that the jurisdictional dispute will disappear if AGC contractors are required to subcontract to subcontractors using respondent's members, is based on a misconception. Doing so would nullify the Board's order, but it would scarcely resolve the dispute. Whatever handicaps the Teamsters face in protecting their jurisdiction as established by the Board, the dispute, at best, will persist on other levels. Respondent seeks only to conduct this jurisdictional dispute away from the Board in negotiations and arbitrations to which Teamsters are not parties, a procedure which will transfer, but will not terminate it.

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* This case does not involve work preservation, but an aggressive effort to expand 701's jurisdiction.

CONCLUSION

Respondent's claims against AGC members were resolved by the Board's assignment of work to Teamsters on identical facts, in a decision extending to "all similarly disputed work." The Court should consider the destructive impact on the "superior authority" of that award of a court of appeals decision that imposes damages on employers who act "in accord with that ruling." *Carey* v. *Westinghouse Electric Corp.*, supra, (1964) 375 U.S. 261, 272.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 27, 1976